

I. INTRODUCTION

This is the Oglala Sioux Tribe's response to the Environmental Protection Agency (EPA) requesting the Tribe's position on the applicability of tribal treaty rights to the Dewey Burdock In Situ Uranium Project in the Southern Black Hills. To understand what Sioux treaties, pertain to the Dewey Burdock Project, it is first important to understand the legal background of each treaty, the identity of each the tribe that signed them, and the applicability of the treaties (or acts implementing them) to the Project.

II. THE OTECI SAKOWIN (SIOUX NATION)

First, it is important to understand that the Oteci Sakowin ("Sioux Nation") is comprised of seven divisions: (1) Medawakanton; (2) Sisseton; (3) Wahpakoota; (4) Wahpeton; (5) Yankton; (6) Yanktonai; and (7) Teton.¹

Secondly, it is important to understand that the Teton Division of the Sioux Nation is comprised of seven distinct, sovereign bands: (1) Blackfeet; (2) Brule; (3) Hunkpapa; (4) Miniconjou; (5) No Bows; (6) Oglala; and (7) Two Kettle.¹ Members of these Teton bands currently reside on the following Indian reservations in North and South Dakota and Nebraska:

<u>TETON BAND</u>	<u>RESERVATION</u>
Blackfeet	Cheyenne River Reservation (S.D.)
Brule	Rosebud Reservation and Lower Brule Reservation (S.D.)
Hunkpapa	Standing Rock Reservation (N.D. & S.D.)
Minneconjou	Cheyenne River Reservation (S.D.)
No Bows	Cheyenne River Reservation (S.D.)
Oglala	Pine Ridge Reservation (S.D. & Neb.)
Two Kettle	Cheyenne River Reservation (S.D.)

Also, members of the Teton bands also reside on the Fort Peck Reservation in Montana.

III. IDENTIFICATION OF SIOUX BANDS THAT HAVE ABORIGINAL RIGHTS AND/OR TREATY RIGHTS TO THE BLACK HILLS

There are three Sioux treaties that recognized aboriginal tile of the Sioux tribes to the Black Hills, and that are relevant to Sioux claims to cultural resources, water rights and fishing rights, and other rights, in the Black Hills.

A. Aboriginal rights to the Black Hills

Exclusive use and occupation "for a long time" prior to the loss of the property

¹ *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 162 (1970).

by a tribe is sufficient to give aboriginal title.² That a ‘long time’ ran during the period of United States sovereignty over [an] area . . . is irrelevant insofar as the perfecting of Indian title is concerned.³ “For a long time” can be from time immemorial or for a given number of years, even “20 to 50 years under appropriate circumstances.”⁴ So, it is undisputed that the Teton Sioux bands held aboriginal Indian title to the Black Hills under federal law, since they occupied the Black Hills “for a long time” prior to and subsequent to an assertion of United States dominion over the area under the Louisiana Purchase.⁵

B. Treaty rights to the Black Hills.

The three treaties that are pertinent to the Oglala Sioux Tribe’s land claims and/or usufructuary rights in the Black Hills, and in particular, the Dewey-Burdock Project Area. The treaties are as follows:

- (1) **1825 TREATY:**⁶ Only **Oglala and Yanktonai bands** were parties to the 1825 Treaty referenced below;
- (2) **1851 FORT LARAMIE TREATY:**⁷ Only the **Teton and Yankton bands** were parties to the 1851 Fort Laramie Treaty that recognized their title to sixty million acres west of the Missouri River;
- (3) **1868 FORT LARAMIE TREATY:**⁸ Only the **Teton Bands, Yanktonai (Cuthead) bands, and Santee Sioux** (primarily those removed from Minnesota after the 1862 conflict) were parties to the 1868 Fort Laramie Treaty.

So, based on the last treaty, the 1868 Fort Laramie Treaty, the following current federally recognized Sioux tribes have treaty rights to the Black Hills (Great Sioux Reservation):

TETON SIOUX

- (1) Blackfeet (based on 1851 and 1868 treaties)
- (2) Brule (based on 1851 and 1868 treaties)
- (3) Hunkpapa (based on 1851 and 1868 treaties)
- (4) Miniconjou (based on 1851 and 1868 treaties)

² *Sac and Fox Tribe v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967) (Citing *Sac and Fox Tribe v. United States*, 315 F.2d 896, 903 (Ct. Cl. 1963), *cert denied* 375 U.S. 921 (1963)).

³ *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419, 423 (1970).

⁴ United States Indian Claims Commission Final Report (Aug. 13, 1946 – September 30, 1978, p. 129 (Citing *United States v. Seminole Indians*, 180 Ct. Cl. 375 (1968), *aff’d* 13 Ind. Cl. Comm. 326 (1964); *Fox Tribe v. United States*, 179 Ct. Cl. 8 (1967)).

⁵ It is also important to note that the Teton and Yanktonai Divisions (bands) also claim title to the fourteen million acres of non-treaty (aboriginal title) lands between the Missouri River and James River in North Dakota and South Dakota. See *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419 (1970).

⁶ 7 Stat. 252.

⁷ 11 Stat. 749.

⁸ 15 Stat. 635.

- (5) No Bows; (based on 1851 and 1868 treaties)
- (6) Oglala (based on 1851 and 1868 treaties)
- (7) Two Kettle (based on 1851 and 1868 treaties)

SANTEE SIOUX

- (8) Santee (based on 1868 Treaty)

YANKTON SIOUX

- (9) Yankton (based on 1851 treaty)

YANKTONAI SIOUX

- (10) Cuthead Yanktonai (based on 1868 Treaty)

IV. THE 1825 TREATY WITH THE OGLALA AND SIOUNE BANDS

The United States and the Oglala Band entered into a treaty of friendship and protection with the Sioune⁹ and Oglala bands on July 5, 1825, 7 Stat. 252. By Article 2 of the 1825 Treaty, the United States brought the Oglala Band and Sioune Band (Yanktonai Cuthead Band) and their members under its protection and the Oglala and Sioune Bands became protectorate sovereign bands of the Sioux Nation of the United States under the 1825 Treaty.¹⁰

IV. THE 1851 AND 1868 FORT LARAMIE TREATIES

A. The 1851 Fort Laramie Treaty

The United States, the seven bands of the Teton Division, and the Yankton Division of the Sioux Nation entered into a treaty on September 17, 1851, 11 Stat. 749,¹¹ at Fort Laramie. Article

⁹ The Sioune are Yanktonai Sioux. Yanktonai Sioux Chief Wah-e-ne-ta (the Rushing Man) signed the 1825 Treaty on behalf of the Yanktonai Sioux.

¹⁰ Article 1 of the 1825 Treaty provided that “[i]t is admitted by the Sioune and Ogallala bands of Sioux Indians, that they reside within the territorial limits of the United States, acknowledge their supremacy, and claim their protection. The said bands also admit the right of the United States to regulate all trade and intercourse with them.” Article 2 of the treaty further provided that “[t]he United States agree to receive the Sioune and Ogallala bands of Sioux into their friendship, and under their protection, and to extend to them, from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States.”

¹¹ The Yankton Sioux Division of the Sioux Nation was also a party to 1851 Fort Laramie Treaty. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147 (1970). The Indian Claims Commission ruled

5 of the 1851 Treaty recognized¹² and defined the territory and reserved rights of the Sioux bands¹³ as follows:

commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Butte, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of the Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

Article 5 of the 1851 Treaty further provided that:

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tract of country heretofore described. (emphasis supplied).

The 1851 Treaty recognized the seven Teton bands' aboriginal Indian title to the sixty million acres described in the treaty.

B. The Powder River War of 1866-1868 and the culmination of the war by the 1868 Fort Laramie Treaty.

Unconsented encroachments on 60 million acres, 1851 Treaty territory by the United States and its citizens resulted in the Powder River War of 1866-1868 between the United States and the Teton Sioux bands (and their allies, the Cheyenne and Arapahoe). Peace was concluded between the United States and the Teton bands by Fort Laramie Peace Treaty on April 29, 1868, 15 Stat. 635. The 1868 Treaty provided for a mutual demobilization without terms of surrender on either side.¹⁴

that the 1851 Treaty was a multi-lateral treaty by which the United States recognized the aboriginal territory of not only the seven Teton bands, but also the aboriginal territories of the other signatory tribes, including the Crow, Cheyenne, Arapahoe, Assiniboiné, Hidatsa (also known as the Gros-Ventre), Mandan and the Arikara tribes. The Commission ruled that article 5 of the 1851 Treaty recognized the Oglala band and other Teton bands' joint and several aboriginal Indian title to the entire sixty-million-acre area west of the Missouri River. *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419, 424 (1970).

¹² Recognition of aboriginal title in an Indian treaty brings the territory under the protection of the Fifth Amendment to the United States Constitution, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

¹³ *United States v. Winans*, 198 U.S. 371 (1905)

¹⁴ The Teton Sioux bands, and other signatory bands to the 1868 Fort Laramie Treaty, were never militarily "conquered" by the United States and since 1868 have lived at peace with the United

Article 2 of the 1868 Treaty established a designated territory (within the 1851 Treaty territory boundaries) for the seven Teton bands and other Sioux bands. This territory is commonly referred to as the “Great Sioux Reservation,” and is described in article 2 of the 1868 Treaty as follows:

Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of the beginning; and in addition thereto, all existing reservations on the east bank of the said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory.¹⁵

Article 2 of the 1868 Treaty also contained the following language after the description of the boundaries of the Great Sioux Reservation:

. . . and *henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereafter provided.* (emphasis supplied).

The words “except as hereafter provided” in Article 2 referred to Articles 11 and 16 of the 1868 Treaty. Article 11 provided in pertinent part as follows:

. . . the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any land north of North Platte, and on the Republican Fork of the Smoke Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase Art. 11. (emphasis supplied)

States under Article 1 of the Treaty, which provided that “[f]rom this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.”

¹⁵ It should be noted that Article 12 of the 1868 Treaty provided that no future cessions of territory **within the Great Sioux Reservation** would be of “any validity or force . . . unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same . . .” Under article 12, the United States and Teton bands agreed to limit their sovereign powers to cede and to accept cessions of land for the protection and peace of both parties.

Article 16 of the provided in pertinent part as follows:

The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any port of the same, or without the consent of the Indians first had and obtained to pass through the same Art. 16.

As noted above, the Oglala Sioux Tribe has repudiated and rejected any cession, voluntary or otherwise, of the remaining 34 million acres of its 1851 Treaty territory located outside the boundaries of the Great Sioux Reservation established by Article 2 of the subsequent 1868 Treaty in Docket 74.

V. THE 1877 BLACK HILLS ACT

After the defeat of General George Crook at the Battle of the Rosebud and Lt. Col. George A. Custer at the Battle of the little Bighorn in Montana in 1876, who were legally hunting in the Bighorn Mountains and Yellow Stone River Country in Montana under Article 11¹⁶ of the 1868 Treaty and militarily attacked in violation of Article 1 of the Treaty, many Sioux bands moved back to the Great Sioux Reservation.

By the Act of February 28, 1877, 19 Stat. 254, Congress purported to ratify and confirm an agreement between commissioners on behalf of the United States and the Teton and other bands of the Sioux Nation (and the Northern Cheyenne and Arapaho tribes).¹⁷ The purported agreement provided for the cession of over 7.3 million acres of territory in the western part of the Great Sioux Reservation, that included the Black Hills. No such agreement existed in fact or in law. When the United States could not obtain the requisite three-fourths adult male signatures required by Article 12 of the 1868 Treaty, Congress unilaterally enacted the 1877 Agreement into law and the agreement became an Act of Congress that confiscated the Black Hills portion of the Great Sioux

¹⁶ Article 11 of the 1868 Treaty provided in part that the Sioux bands “reserved the right to hunt on any lands north of North Platte [River], on the Republican Fork of the Smokey Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase.” Article XVI of the Treaty further provided that “[t]he United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory. . . .” The Sioux bands were thus recognized with having an expanded hunting right to hunt in the Bighorn Mountains and Yellow Stone River country in 1876.

¹⁷ In 1871, Congress quit entering into treaties with Indian tribes because the House of Representatives wanted to have a say in the treaty making process, which only required ratification by the Senate. 25 U.S.C. § 71. Thereafter, agreements with Indian tribes were called agreements and required approval of both houses of Congress.

Reservation without the consent of the Sioux bands that are signatory to the 1868 Treaty.¹⁸

Article 8 of the 1877 Black Hills Act is applicable to any type of mining activity in the Black Hills Portion of the Great Sioux Reservation, including In Situ uranium mining in the Dewy-Burdock area of the Black Hills, which provides in pertinent part that:

. . . Congress shall, by appropriate legislation, secure to them an orderly government; **they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person and life.** (emphasis added).

The words “they shall be subject to the laws of the United States” was interpreted by the Supreme Court to mean subject to the trust responsibility laws of the United States.¹⁹ In this regard, it is important to note that federal courts have held that “[t]he existence of a trust duty between the United States and an Indian or *Indian tribe* can be inferred from the provisions of a statute, treaty or other agreement, reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people,”²⁰ and that **all government agencies have “fiduciary” responsibilities to tribes, and must always act in the interests of the beneficiaries.**²¹ (emphasis added). “All government agencies” include the Bureau of Land Management (BLM), the Nuclear Regulatory Commission (NRC), and the Environmental Protection Agency (EPA).

VI. THE 1889 SIOUX ACT THAT ESTABLISHED THE PINE RIDGE INDIAN RESERVAION AND OTHER SIOUX RESERVATONS.

By the Act of March 2, 1889, 25 Stat. 888, Congress conditionally provided for the creation of six smaller reservations within the balance of the Great Sioux Reservation. These six smaller reservations are the Pine Ridge Indian Reservation, the Rosebud Indian Reservation, the Standing Rock Indian Reservation, the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation and the Crow Creek Indian Reservation. The 1889 Act was expressly conditioned upon the acceptance of and consent to its provisions in the manner required by article 12 of the

¹⁸ The 1877 Act also provided in Article 1 that “the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified ad described, including all privileges of hunting and article 16 of said treaty is hereby abrogated.” This language not only violated Article 12 of the 1868 Treaty, but also Section 12 of the Trade and Intercourse Act of June 20, 1834, 4 Stat. 730 (codified at 25 U.S.C. § 177), which provided that “[n]o purchase, gran, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe or Indians, shall be of any validity in law or equity, unless the same is made by treaty or convention entered into pursuant to the Constitution.”

¹⁹ *Ex Parte Crow Dog*, 109 U.S. 556, 568-69 (1883) (“They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian . . .”).

²⁰ *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d ,1094, 1100 (8th Cir. 1989).

²¹ *Covelo Indian Community v. FERC*, 895 F.2d 581 (9th Cir. 1990).

1868 Fort Laramie Treaty and Section 28 of the Act, i.e., the signatures of three-fourths of the adult male members of the Sioux bands that were signatory to the 1868 Treaty.²²

VII. INDIAN CLAIMS COMMISSION AND COURT OF CLAIMS CASES

The original Sioux treaty land claims were filed as Docket 531 in the Court of Claims under a 1920 Special Jurisdictional Act.²³ The Black Hills Claim or the claims, Docket 531 (7), was dismissed by the court in 1942.²⁴

The Sioux land claims were refiled in the Indian Claims Commission in 1950 under the 1942 Indian Claims Commission Act in 1950 as Docket 74. Docket 74 was bifurcated into two claims by the Indian Claims Commission in 1960, Dockets 74-A and 74-B.

DOCKET 74-A: It involved claims for compensation based on a “cession” of 48 million acres of Sioux territory under Article 2 of the 2868 Fort Laramie Treaty, i.e., 34 million acres of 1851 treaty lands west of the Missouri River and 14 million acres of non-treaty lands east of the Missouri River²⁵ located outside of the exterior boundaries of the Great

²² In *Oglala Sioux Tribe v. United States Army Corps of Engineers*, *Oglala Sioux Tribe v. US Army Corps of Engineers*, 537 F. Supp. 2d 161 (D.D.C. 2008), the Oglala Sioux Tribe provided evidence to the United States District Court for the District of Columbia in a boundary dispute (and not a land claim) that the United States has never obtained the requisite three-fourths adult male signatures to lawfully implement the 1889 Act under Article 12 of the 1868 Treaty, and under Section 12 of the Act itself, and that the Act was void *ab initio* under Section 28 of the Act if it is proven that the requisite three fourths adult male signatures were not obtained by the Government and that: “upon failure of such proof . . . this act becomes of no effect and null and void.” The District Court never-the-less dismissed the action for lack of standing.

For purposes of the Dewey-Burdock In Situ Uranium Project, it is important to note that the Cheyenne River, whose head waters flow from eastern Wyoming into western South Dakota, abuts the Pine Ridge Indian Reservation that was established under the 1889 Act, and that the riverbed where it abuts the reservation is within the exterior boundaries of the Pine Ridge Indian Reservation and is presently considered trust property held in the name of the United States in trust for the tribe. As trust property, the United States has a trust responsibility to protect the water and riverbed from any pollution caused by uranium mining, or otherwise, within the drainage area of the Cheyenne River and its tributaries.

²³ Act of June 3, 1920, 41 Stat 738.

²⁴ The Black Hills Claim (Docket C-531 [7]) was dismissed by the Court of Claims on the basis that the court was not authorized by the 1920 special jurisdictional act to question whether the compensation afforded the Sioux by Congress in 1877 was an adequate price for the Black Hills, and that the Sioux claim in this regard was moral claim not protected by the Just Compensation Clause of the Fifth Amendment. *Sioux Nation v. United States*, 97 Ct. Cl. 613 (1942).

²⁵ See *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419 (1970). “After finding that the Teton and Yanktonai divisions possessed aboriginal title to the 14-million-acre area, the Indian Claims Commission determined that “[b]y the Treaty of April 29, 1868, 15 Stat. 635, which was proclaimed

Sioux Reservation as it existed after the passage of the 1877 Act, i.e., the Great Sioux Reservation minus the Black Hills portion of the reservation after the Black Hills were confiscated in 1877).

DOCKET 74-B (later changes to Court of Claims Docket 178-78 when it was refiled in the Court of Claims under a special jurisdictional act in 1978): It involved claims based on an unconstitutional taking of **7.3 million** acres (the Black Hills)²⁶ portion of the Great Sioux Reservation in violation of the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

These two territories are delineated on the Indian Claims Commission's map (at 38 Ind. Cl. "Comm. 469, 531 (1976)), and attached hereto as Exhibit "A."

After examining the history behind the Sioux claims based on a cession under the 1868 Treaty -- advanced by the Claims attorneys and not the Oglala Sioux Tribe -- the Indian Claims Commission found that: "The Indian Peace Commission presented the proposed treaty to the Sioux Bands in a series of councils held in the spring of 1868 . . . At these councils, after hearing an explanation of the terms of the treaties, the Sioux generally voiced these sentiments; 2--*they were unwilling to cede any of their lands . . .*" And that "it is clear that, based on the representations of the United States negotiators, the Indians cannot have regarded the 1868 Treaty as a treaty of cession. *Nowhere in the history leading up to the treaty negotiations themselves is there any indication that the United States was seeking a land cession or that the Sioux were unwilling to consent to one. On the contrary, the evidence is overwhelming that the Sioux would never have signed the treaty had they thought they were ceding any land to the United States.* *Sioux Tribe v. United States*, 42 Ind. Cl. Comm. 214 (1978).

The Indian Claims Commission then concluded that "as a matter of law that the goods and services promised by the United States under the 1868 treaty were not intended by the Sioux (or by the government negotiators) to be consideration for any Sioux Lands. The history of this case makes it clear that this treaty was an attempt by the United States to obtain peace on the best terms possible. *Ironically, this document, promising harmonious relations, effectuated a vast cession of land contrary to the understanding and intent of the Sioux.*"²⁷ Id. (emphasis supplied)

on February 24, 1869, the subject lands of the Tetons and Yanktonai were ceded to the United States..." Id. The boundary of the aboriginal title area is described at 23 Ind. Cl. Comm. 424-425.

²⁶ Court of Claims Docket 178-78 also involved the taking of three rights-of-way across the Great Sioux Reservation and placer (surface) gold stolen by trespassing miners prior to the 1877 when the Black Hills were considered part of the Great Sioux Reservation.

²⁷ Historical evidence introduced in Docket 74 showed that: (1) the Indians would fight to the death to retain the Power River Country, 42 Ind. Cl. Comm. at 241, (2) Two Lance, a Two Kettle, indicated that his people did not want to give up their land, 42 Ind. Cl. Comm. at 241, (3) One Horn stated that the Sioux would never cede their country, 42 Ind. Cl. Comm. At 248, (4) Sitting Bull announced that he had no intention of selling any land to the whites, 42 Ind. Cl. Comm. at 249, (5) General Sanborn added that the government understood "when you tell us that you don't want to receive any present, that you don't wish to be thought of as selling your land" and that "[w]e are not going to give you the goods in exchange for any land . . . ,", 42 Ind. Cl. Comm. At

The Oglala Sioux Tribe does not agree to the “cession” of Sioux lands in Docket 74 and passed two resolutions to withdraw from Docket 74 so as not to be a party of the fraud by the Federal Government and claims attorneys being perpetuated on Tribe and its members. See Tribal Council Resolutions Nos. 83-160 and 84-47. In addition to being contrary to the rule of statutory construction that “Indian treaties are to be interpreted in the sense in which they would naturally be understood by the Indians and any ambiguity is to be resolved to their favor,” see *Choctaw Nation v. Oklahoma*, 397 US 620 (1970); *Winters v. United States*, 207 US (1908); and *United States v. Shoshone Tribe of Indians*, 304 US 111 (1938), the Tribe’s position in withdrawing from Docket 74 is well-stated in its petition for a writ of certiorari in *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046 (Fed. Cir. 1986), cert. denied sub nom. *Oglala Sioux Tribe v. United States*, --- U.S. ---, 107 S. Ct. 3184, 96 L. Ed. 2d 673 (1987), cert. denied sub nom. *Oglala Sioux Tribe v. United States*, --- U.S. ---, 107 S. Ct. 3184, 96 L. Ed. 2d 673 (1987), and in Judge Newman’s subsequent dissenting opinion in the *Oglala Sioux Tribe’s Motion for Relief from Judgement in Oglala Sioux Tribe and Rosebud Sioux Tribe v. United States*, 862 F2d 275, (Fed. Cir. 1988). It is also worthy of notice that the Oglala Sioux Tribe has continuously rejected the Indian Claims Commission award in Docket 74 from 1978 to the present time. The Oglala Sioux Tribe has exhausted its federal judicial remedies in the United States Judicial System, and still claims title to the 34 million acres of 1851 Treaty lands outside the Great Sioux Reservation on the basis that the Sioux tribes never legally ceded these lands under the 1868 Treaty and ownership of these lands still be resolved legislatively through government-to-government obliteration with the U.S. Congress.

One cannot understand land claims litigation unless one knows the legal history of the tribes involved in the litigation. It is therefore important to understand that, since time immemorial, the seven Teton bands, along with certain other Sioux bands, jointly and severally, have exclusively used and occupied the following territories in the Missouri River Basin:

- (1) West of the Missouri River, approximately sixty million acres of land in what are now the States of North Dakota, South Dakota, Nebraska, Montana and Wyoming recognized in Article 5 of the 1851 Fort Laramie Treaty; and
- (2) East of the Missouri River, approximately fourteen million acres of non-treaty (aboriginal title) land in what are now the States of North Dakota and South Dakota recognized by the Indian Claims Commission.²⁸

These two territories are delineated on the Indian Claims Commission map cited at 38 Ind. Cl. “Comm. 469, 531 (1976), and attached hereto as Exhibit “A.”

VIII. OST AUTHORITY TO ENFORCE ITS TREATY AND STATUTORY RIGHTS TO PROTECT THE TRIBE AND ITS MEMBERS RIGHTS UNDER FEDEAL

251, and (6) after the terms concerning the extent of Sioux territory and the provisions keeping out white people were read to him Red Cloud finally signed the treaty, 42 Ind. Cl. Comm. At 252.

²⁸ *Sioux Nation v. United States*, 23 Ind. Cl. Comm. (1970).

The Oglala Band of the Teton Sioux is a sovereign band of Indians with attendant powers that reorganized the “Oglala Sioux Tribe of the Pine Ridge Indian Reservation” (“OST”) by adopting the benefits of the Indian Reorganization Act (“IRA”) of June 18, 1934, 25 U.S.C. § 5101 *et seq.*, and a Constitution and Bylaws under Section 16 of the Act, 25 U.S.C § 5123). Under Article III, Section 1 of the Tribal Constitution provides that the governing body of the Oglala Sioux Tribe is the “Oglala Sioux Tribal Council.”

The Oglala Sioux Tribe’s federally approved Tribal Constitution specifically empowers the Tribal Council to:

- (1) “To negotiate with the Federal, State, and local governments, on behalf of the tribe, and to advise the representatives of the Interior Department on all activities of the Department that may affect the Pine Ridge Indian Reservation” under Article IV, Section 1 (a);
- (2) To protect and preserve the property, wild life and natural resources – gases, oil, and other materials, etc. – of the tribe . . .” under Article IV, Section 1 (m); and
- (3) “To adopt laws protecting and promoting the health and general welfare of the Oglala Sioux Tribe and its membership” under Article IV, Section 1 (w), and

The Oglala Sioux Tribe presently enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 71 and Section 4 of the Act of June 15, 1935, 49 Stat. 378 (codified at 25 U.S.C. § 5128.

IX. EPA HAS A FIDUCIARY DUTY TO PROTECT THE OGLALA SIOUX TRIBE FROM THE HARMFUL EFFECTS OF URANIUM DEVELOPMENT WITHIN ITS TREATY TERRITORIES AND PROTECT THE PROPERTY, PERSONS AND LIVES OF OGLALA SIOUX TRIBAL MEMBERS UNDER ARTICLE 8 OF THE 1877 ACT.

As a federal agency of the United States Government, the EPA has a fiduciary duty to protect the Oglala Sioux Tribe and its members from any adverse impacts resulting from uranium mining in the Dewey-Burdock project area of the southern Black Hills. Adverse impacts include, but are not limited to, the following:

- (1) Failure to comply with tribal treaties and federal statutes, including the protection of tribal fisheries in the Cheyenne River from its headwaters in Wyoming to its confluence with the Missouri River, as provided in Article 5 of the 1851 Treaty and federal case law, and protection of the property, persons and lives of tribal members under Article 8 of the 1877 Black Hills Act against contamination of the environment in which tribal members reside. This also includes ensuring clean water for fish habitat in the river to protect the Tribe’s rights to fish in the river under Article 5 of the 1851 Treaty.²⁹

²⁹ There is also a corresponding 1851 Treaty right to maintain the Cheyenne River and its tributaries inhabitable for the Oglala Sioux Tribe’s fisheries in the river and its tributaries, i.e., water rights

- (2) Failure to protect the Tribe and its members from ground water contamination that affects the spiritual significance of sacred site and burial sites (both currently known and those yet to be discovered) by competent surveys, i.e., you can't make a holy place unholy by disturbing its natural conditions, including the ground water under these sites by polluting the waters with toxic uranium extraction chemicals and injection wells;
- (3) Failure to protect the Tribe and its members from surface water contamination, in that ground waters at the uranium site will eventually percolate into the Cheyenne River and its tributary streams and creeks. Not only are tribal fisheries going to be adversely impacted, but, pollution in the river will eventually flow onto the river and river bed of the Cheyenne River where it abuts the Pine Ridge Indian Reservation;³⁰ and affects agricultural on the reservation, and the health and welfare of tribal members residing on the reservation by contamination of ground water wells and the river itself from ;
- (4) The destruction of the Tribe's Winters Doctrine Water Rights and aboriginal water rights in the Cheyenne River and its tributary streams and creeks. Winters Doctrine

that impose a duty on EPA and other concerned federal agencies, to protect both the Tribe's water rights and fishing rights from contaminants from uranium mining (or otherwise) that will negatively impact and/or destroy the Tribes fishing rights in the river. See, e.g., *United States v. Adair*, 723 F.2d 1394, 1408-1415 (9th Cir. 1983) ("*Adair II*"), *cert. denied sub nom, Oregon v. United States*, 467 U.S. 1252, 104 S. Ct. 3536, 82 L. Ed. 2d 841 (1984). (off-reservation treaty right to fish implied reservation of water to support tribal fisheries); *Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1317 (Wash. 1993) (Washington Supreme Court recognized that tribes with treaty language . . . reflecting a reservation of aboriginal rights to fish also have water rights for instream flow habitat protection). Also see *United States v. Alpine Land & Reservoir Co.*, 788 F. Supp. 2d 1209 (D. Nev. 2011) ("the Tribe retains a *Winters* right . . . to water to maintain the fishery"), *citing Nevada v. United States*, 463 U.S. 110 (1983). Also see *Hopi Tribe v. U.S.*, 782 F.3d 662, 669 (Fed. Cir. 2015) (In some circumstances, [the Winters Doctrine] may also give the United States the power to enjoin others from practices that reduce the quality of water feeding the reservation); Judith V. Royster, *Water Quality And The Winters Doctrine*, 107 Water Resources Update 50 (1997), <http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1291&context=jcwre> (A tribe may receive the quantity of water called for under its Winters rights, but the quality of the water may make it unusable for the purposes for which it was intended . . . * * * If the water provided at the reservation border is so degraded that it cannot be used for irrigation, then the water right is essentially meaningless).

³⁰ The Oglala Sioux Tribe's off-reservation and on-reservation Winters Doctrine and aboriginal ground and surface water rights in the Cheyenne River and its tributaries are trust property. This includes the ground waters in the Dewey-Burdock Project Area that feeds the Cheyenne River. See generally, Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Resources J. 399 (2006) ("Indian reserved water rights are trust property with legal title held by the United States"); 55 Fed. Reg. 9223 (Mar. 12, 1990) ("Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians").

water rights are vested, Fifth Amendment property rights held in trust by the Federal Government;

- (5) Failure to comply with NEPA, the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, *as amended*, 16 U.S.C. § 470 *et seq.* (“NHPA”), and the Native American Graves Protection and Repatriation Act of November 16, 1990 (25 U.S.C. §§ 3001 *et seq.*) (“NAGPRA”), and other environmental statutes and cultural resources statutes.;
- (6) Failure to conduct complete, competent cultural surveys as required by federal law to protect cultural resources, spiritual sites, and rock features, and human remains, o³¹ n both federal and private lands³² in the project area; and
- (7) Failure to engage in meaningful government-to-government consultations as required by Executive Order 175 and Section 106 of the NHPA.

X. CONCLUSION

The Oglala Sioux Tribe and other 1851 Treaty and 1868 Treaty signatory tribes have never had government-to-government consultations with EPA for the Dewey-Burdock In Situ Uranium Project under Executive Order No. 13175 as implement by President Obama’s November 5, 2009 memorandum, or under Oglala Sioux Tribal Council Ordinance No. 11-10, under applicable federal environmental laws, including Section 106 of the NHPA, and under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly on Thursday, 13 September 2007, and supported by the December 6, 2010 declaration of President Obama. The following articles of UNDRIP regarding consultations with the Oglala Sioux Tribe are applicable to the Dewey-Burdock Project:

³¹ The Oglala Sioux Tribe claims ownership (along with other 1851 Treaty signatory Sioux tribes) of all Native American burial sites and human remains, and an ownership interest in all cultural items, associated funerary objects, unassociated funerary objects, sacred objects, cultural patrimony, including stone features, i.e., stone rings, stone effigies, stone alignments, rock cairns located on federal lands under NAGPRA, and a right of access to sacred sites located on federally held lands within the Dewey-Burdock Project Area under the American Indian Religious Freedom Act (“AIRFA”), 42 U.S.C. § 1996.

³² The Federal Government has a fiduciary duty to protect the Sioux tribes’ under the legal principles recognized in *Charrier v. Bell*, 496 So. 2d 601 (La. App. 1 Cir. 1986) *cert. denied*, 498 So. 2d 753 (La. 1986) (Tunica-Biloxi Tribe retained ownership of cultural items discovered on privately held lands) and *Black Hills Inst. of Geological Research v. South Dakota Sch. of Mines*, 12 F.3d 737, 742-744 (8th Cir. 1993) (Black Hills III) (Because the [dinosaur] fossil was trust property that was removed from the Indian trust land without the knowledge or consent of the United States, it remained the property of the United States. Likewise, the tribe’s cultural resources located on private lands are still trust property held in trust for the tribes by the United States, were not conveyed to the present non-Indian occupants under the Homestead Act or otherwise; the United States and its agencies therefore have a fiduciary duty to protect these cultural resources on private lands to the same extent that it had a duty to a dinosaur fossil removed from trust land in the *Black Hills Inst.*, *supra*.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing . . . *administrative* measures that may affect them.

Article 32: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Accordingly, the Oglala Sioux Tribe requests that the EPA engage in government-to-government consultations under the above-referenced legal authority to address all the concerns of the Tribe as articulated above.

ORDINANCE OF THE OGLALA SIOUX TRIBAL COUNCIL
OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

ORDINANCE OF THE OGLALA SIOUX TRIBAL COUNCIL ESTABLISHING PROCEDURES FOR GOVERNMENT-TO-GOVERNMENT CONSULTATION BETWEEN THE OGLALA SIOUX TRIBE AND THE UNITED STATES GOVERNMENT, AND OTHER GOVERNMENTS.

WHEREAS, the Government-to-Government relationship between the Oglala Sioux Tribe was established in the United States Constitution, Article 6 (Supremacy Clause); the Treaty of July 2, 1825, United States-Oglala Band of Sioux Nation, 7 Stat. 252; Rev. Stat. § 2116, 25 U.S.C. § 177 (codifying section 12 of the Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 730); the Treaty of September 17, 1851, United States-Teton Division of Sioux Nation, et al., 11 Stat. 749; the Treaty of April 29, 1868, United States-Sioux Nation, 15 Stat. 635; Rev. Stat. § 2079, 25 U.S.C. § 71 (codifying the Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566), the Indian Reorganization Act of June 18, 1934, ch. 476, 48 Stat. 984, 25 U.S.C. § 461 et seq., the Indian Self-Determination and Education Assistance Act of January 4, 1975, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. § 450, et seq., and other Congressional enactments, and

WHEREAS, the 1851 Treaty recognized title in the Oglala Band to 60 million acres of territory currently in the States of North Dakota, South Dakota, Nebraska, Montana and Wyoming for the Oglala Sioux Tribe and other Sioux tribes, and

WHEREAS, a permanent homeland was established within the 1851 Treaty territory for the "absolute and undisturbed use and occupation" of the Oglala Sioux Band and other Sioux bands, which homeland has been referred to as the "Great Sioux Reservation" and comprises substantially all of present day South Dakota west of the east bank of the Missouri River, and

WHEREAS, the Indian Claims Commission also found that the Oglala Band and other Sioux bands held aboriginal (non-treaty) title to 14 million acres east of the Missouri River in the States of North Dakota and South Dakota, and

WHEREAS, uncontested encroachments on the 1851 Treaty territory by the United States and its citizens resulted in the Powder River War of 1866-1868 between the United States and the Oglala band and other bands of Sioux Indians. as a result of which, peace was concluded between the United States and the Oglala Band and other Sioux bands by treaty on April 29, 1868, 15 Stat. 635 ("1868 Fort Laramie Treaty," which treaty was duly ratified by the United States on February 16, 1869 and proclaimed by the President on February 24, 1869, and

WHEREAS, the 1868 Treaty provided for a mutual demobilization of the United States and Oglala Band and other Sioux bands without terms of surrender on either side, and as a result thereof, the Oglala Band and other Sioux bands were never militarily conquered by the United States, and the Oglala Band has abided by the 1868 Treaty and resided on its reservation in accordance of the terms of the treaty since 1868, except for incidences in Montana in 1876 where the Oglala Band and other Sioux bands were legally exercising its 1868 Treaty, Article 11, hunting rights and yet had to defend themselves from attack by the United States Cavalry in violation of Articles 1 and 11 of the 1868 Treaty, and

WHEREAS, subsequent to ratification of the 1868 Treaty, no aboriginal or treaty territory of the Oglala Band was ever acquired by the United States in accordance with 25 U.S.C. § 177 or Article 12 of the 1868 Treaty, and all acquisitions of Oglala Band's territory was either confiscated by the United States or acquired with the requisite consent of the Band, and

WHEREAS, the "Oglala Band" reorganized in 1936 as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" under Section 16 of the 1934 Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, by adopting a constitution and bylaws approved by the Secretary of the Interior, and presently enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b

WHEREAS, as a result of its unique government-to-government relationship with the United States, and because the Oglala Band (now Oglala Sioux Tribe) is one of the few militarily unconquered Sioux tribes in the United States and all of its territory now in the possession of the United States was acquired without its consent, the Oglala Sioux Tribe still possesses very strong aboriginal rights within all the territory that comprised its aboriginal homeland, and as a result thereof, the Tribe has both a domestic and international rights to government-to-government consultations with the United States on the formulation of federal policies, or on all federal actions or undertakings that adversely affect its aboriginal and treaty territories, and

WHEREAS, the Executive Branch of the united States Government has recognized the right of government-to-government consultations with Indian Tribes in:

- a. President Clinton's Memorandum of April 29, 1994, which, among other things, directed agencies to:

- (i) "ensure that the department or agency operates within a government-to-government relationship with Federally-recognized Tribal government,"
 - (ii) "consult, to the greatest extent practicable ad to the extent permitted by law with Tribal governments prior to taking actions that affect Federally recognized tribes, to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals," and
 - (iii) "assess the impacts of Federal government plans, projects, programs, and activities on tribal trust resources to assure that Tribal government rights and concerns are considered during the development of such plans, projects, and activities."
- b. President Clinton's Executive Order No. 13084 of May 19, 1998, which directed federal agencies to respect tribal self-government and sovereignty, tribal rights, and tribal responsibilities whenever they develop policies "significantly affecting Indian tribal governments,"
- c. President Clinton's Executive Order No. 13175 of November 6, 2000, which directed all federal agencies to establish consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, and
- d. President Barak Obama Memorandum of November 5, 2009, to the heads of the Executive Department and federal agencies to submit plans of actions that the agencies will take to implement the policies and directives of President Clinton's Executive Order 13175,

and

WHEREAS, Congress has also mandated government-to-government consultation with Indian tribes, which have been implemented in statutes, orders, regulations, rules, policies, manuals, protocols and guidance, most of which are described in a document issued by the White House- Indian Affairs Executive Working Group (WH-IAEWG), dated January, 2009, and entitled "List of Federal Tribal Consultation Statutes, Orders, Regulations, rules, Policies, Manuals, protocols and guidance," and

WHEREAS, the Oglala Sioux Tribe has never enacted legislation (ordinances) establishing procedures for government-to-government consultation between the Tribe and the United States, and believes that such procedures are necessary to establish a clear process for documenting the nature and results of consultations between the Tribe and the United States and its agencies, now

THEREFORE BE IT ORDAINED, that the following sections relating to government-to-government consultations are hereby adopted for the Oglala Sioux Tribe.

Section 1. Title. This ordinance shall be known and referred to as the Oglala Sioux Tribe Consultation and Coordination Ordinance of 2001.

Section 2. Definitions. The following words and phrases used in this Election Code shall have the following meanings:

"Consultation" and/or "government-to-government" consultation shall mean the formal process of cooperation, negotiation, and mutual decision making between the Oglala Sioux Tribe and the United States Government, and other governments. It is the process through which sovereign governments develop a common understanding of technical and legal issues and use this understanding to formulate mutually agreeable decisions.

Section 3. Scope. This ordinance is intended to extend to:

- a. All of the aboriginal homeland of the Oglala Sioux Tribe, including, the 60 million acre territory Sioux territory described in Article 5 of the 1851 Ft. Laramie Treaty; the territory and the expanded hunting rights territory described in Articles 2, 11 and 16 of the 1868 Ft. Laramie Treaty;
- b. All of the aboriginal title (non-treaty) Sioux territory comprising 14 million acres located east of the Missouri River in the present states of North Dakota and South Dakota; and
- c. All undertakings and actions that adversely affect the Oglala Sioux Tribe's aboriginal, treaty or statutorily recognized rights and interests within its aboriginal and treaty recognized territories.

Section 4. Purpose. The primary purpose and intent of this ordinance is to:

- a. Establish a clear process for documenting the nature and results of government-to-government consultations between the Oglala Sioux Tribe and Federal Government and its agencies;
- b. Provide a consistent, orderly process to government-to-government consultation to make and ensure that government-to-government consultations are meaningful and effective, and
- c. Be applicable, to the fullest extent possible, for documenting the nature and results of government-to-government consultations between the Oglala Sioux Tribe and other Indian tribes, inter-tribal organizations and state governments and agencies.

Section 5. Authority. This ordinance is adopted pursuant to the Oglala Sioux Tribe's inherent sovereignty and Article IV, Section 1 (a) of the Amended Constitution of the Oglala Sioux Tribe, which empowers the Tribal Council "(a) To negotiate with the Federal, State, and local governments, on behalf of the tribe, and to advise and consult with representatives of the Interior Department on all activities of the Department that may affect the Pine Ridge Indian Reservation."

Section 6. Principles and guidelines. All government-to-government consultations between the Oglala Sioux Tribe and the Federal Government, and State or other tribal governments, shall be conducted with the Oglala Sioux Tribe under the following principles and guidelines:

- a. The Oglala Sioux Tribe is a sovereign government with attendant powers;
- b. All treaties between the Oglala Sioux Tribe and the United States must be honored and enforced to the fullest extent possible;
- c. The Oglala Sioux Tribe has never been militarily conquered by the United States, and has existed in a peaceful relationship with the United States since 1868, pursuant to Article I of the 1868 Ft. Laramie Treaty; and

- d. The Oglala Sioux Tribe and its territories are not possessions of the United States.

Section 7. Procedures. All consultation between the Oglala Sioux Tribe and the Federal Government, and State or other tribal governments, must:

WHEN CONSULTATION IS REQUESTED BY
THE FEDERAL GOVERNMENT OR OTHER GOVERNMENTS

- a. Occur through a formal meeting with the Oglala Sioux Tribal Council. Neither the Executive Committee nor any Executive Committee member or staff member of the Tribe shall be authorized to engage in government-to-government consultations with any government or governmental agency;
- b. Accomplish the goals and objectives described in Section 8.
- c. Be initiated by serving a formal written request for government-to-government consultation with the Secretary of the Oglala Sioux Tribe. The request for consultation should describe the impending, proposed project or activity that may or may not affect the Oglala Sioux Tribe's interests in its aboriginal or treaty territory and/or rights or interests therein. This include the Tribes aboriginal and treaty territory both within and outside the exterior boundaries of the Pine Ridge Indian Reservation;
- d. It shall be the duty of the Tribal Secretary to immediately notify all members of the Executive Committee and Tribal Council of each request for consultation;
- e. Upon receipt of a request for consultation, the Tribal President, or council members under established procedures, shall call a special council meeting for the purpose of responding to the request for consultation. The Tribal Council shall:
 - (i) Request by resolution a policy-level meeting, initiating government-to-government consultations;

- (ii) Authorize the Tribe's technical staff (and when appropriate the Tribe's attorneys) to meet with the responding government's technical staff to discern and define the issues that are subject to the request for consultation including how the proposed governmental undertaking or activity affects the tribe's aboriginal, treaty, statutory or other interests;
- (iii) Schedule a special council meeting in which the Tribe's technical staff (and when appropriate the Tribe's attorneys) can fully brief the Tribal council on the issues that are subject to consultation, with recommendations and opinions;
- (iv) Schedule a follow-up special council meeting in which the Tribe through the Tribal council shall engage in formal government-to-government consultation based on the recommendations and opinions of its staff (and attorneys); and
- (v) Pass a resolution fully articulating the Tribe's formal decision, which decision shall be consistent with the provisions of this ordinance.

WHEN CONSULTATION IS REQUESTED BY THE OGLALA SIOUX TRIBE

- a. Be initiated by passing a tribal council resolution requesting government -to-government consultation, which resolution shall be executed and sent by the Tribal President to appropriate official of the Federal Government or tribal or state government with which consultation is desired;
- b. Follow the procedure described in Subsections 7.e. (i) through (v) above; and
- c. Accomplish the same objectives described in Section 8.

Section 8. Objectives. All government-to-government consultations should ensure the following results:

- a. Tribal officers and officials proceed in a dignified, orderly manner, keeping in mind that the Oglala Sioux Tribe is engaging in the consultations as a sovereign government that maintains government-to-government relations with the United States Government and other governments. Tribal officials engaging in consultation should dress in appropriate attire during the consultation proceedings, and conduct themselves in a professional, dignified, and diplomatic manner;
- b. Tribal officers and officials fully understand the issues to be discussed prior to engaging in and consultation proceeding; this includes an understanding of tribal history, federal treaties and federal statutes, regulations and rules, that will be discussed at each consultation;
- c. Ensure that the Tribe's interest are fully protected, including interests in all tracts of land located within the Tribe's aboriginal and treaty territories, and interests therein, as well as tribal cultural resources, human remains, and any other tribal patrimony;
- d. Ensure compliance with federal treaties, statutes, regulations and rules and tribal policies (e.g., policy that the Black Hills Are Not For Sale and tribal land claims must include restoration of federally held lands to the Tribe);

Section 9. Documentation. Following any governmental-to-government consultation between the Oglala Sioux Tribe and the Federal government, or other governments, the Tribal Council shall:

- a. Achieve a bi-lateral decision between the Tribe and the United States, or other government;
- b. Adopt a resolution documenting the nature and results of the consultation and bilateral decision;
- c. Direct the Tribal Secretary to file a copy of the resolution and all backup documentation with the Tribal Records Department.

Section 10. Representations. Neither the Federal Government nor any agency thereof, nor any other government, shall legitimately represent to any other government or governmental entity, nor to any third party, that they have consulted with the Oglala Sioux Tribe unless they fully comply with the terms and conditions of this ordinance.

Section 11. Effective Date. This ordinance shall become effective immediately.

Section 12. Repeal of inconsistent ordinances. All previously enacted ordinances are hereby repealed to the extent that they are inconsistent with this ordinance.

C-E-R-T-I-F-I-C-A-T-I-O-N

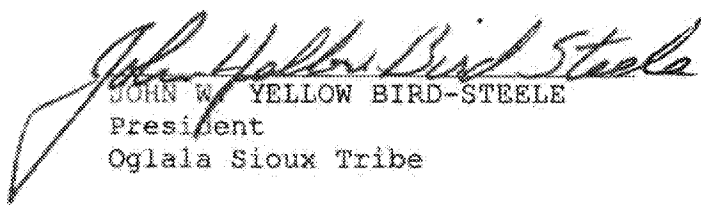
I, as undersigned Secretary of the Oglala Sioux Tribal Council of the Oglala Sioux Tribe, hereby certify that this Ordinance was adopted by a vote of: 13 For; 1 Against; 0 Abstain; and 0 Not Voting, during a SPECIAL SESSION held on the 7th day of JUNE, 2011.



RHONDA J. TWO EAGLE

Secretary
Oglala Sioux Tribe

A-T-T-E-S-T:



JOHN W. YELLOW BIRD-STEELE
President
Oglala Sioux Tribe

RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL
OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

RESOLUTION OF THE OGLALA SIOUX TRIBE REQUESTING THAT THE UNITED STATES PLACE A MORATORIUM ON ALL PROPOSED ACTIVITY IN CONNECTION WITH THE PROPOSED DEWEY-BURDOCK IN SITU RECOVERY URANIUM PROJECT UNTIL THE UNITED STATES COMPLETES ALL REQUIRED FEDERAL LAWS, INCLUDING THE NATIONAL ENVIRONMENTAL PROTECTION ACT AND THE NATIONAL HISTORIC PRESERVATION ACT, AND UNTIL THE UNITED STATES ENGAGES IN MEANINGFUL GOVERNMENT-TO-GOVERNMENT CONSULTATION WITH ALL SIXTEEN (16) TRIBES OF THE GREAT SIOUX NATION AND OTHER AFFECTED INDIAN TRIBES, NOT JUST THE OGLALA SIOUX TRIBE, AND ALLOWS ALL AFFECTED INDIAN TRIBES TO THE OPPORTUNITY, ACCESS, TIME, AND RESOURCES TO COMPLETE THOROUGH, ACCURATE ARCHAEOLOGICAL, CULTURAL, AND HISTORIC PRESERVATION SURVEYS PRIOR TO COMPLETION OF THE SECTION 106 PROCESS UNDER THE NATIONAL HISTORIC PRESERVATION ACT, TO ENSURE PROPER PROTECTION OF THE BLACK HILLS AND SACRED LANDS IN AND AROUND THE BLACK HILLS, ALL OF WHICH ARE WITHIN THE TREATY PROTECTED TERRITORY OF THE GREAT SIOUX NATION UNDER THE FORT LARAMIE TREATIES OF 1851 AND 1868.

WHEREAS, the Oglala Sioux Tribe organized under Section 16 of the Indian Reorganization Act of 1934 on December 14, 1935 (25 U.S.C. § 5123) by adopting a federally approved Constitution and By-laws, and under Article III of the Tribal Constitution, the Tribal Council is the governing body of the Oglala Sioux Tribe, and

WHEREAS, under Article IV, Section 1(a), of the Tribal Constitution, the Tribal Council is vested with the power to negotiate with the United States on behalf of the Tribe and its members, and

WHEREAS, the proposed Dewey-Burdock In Situ Recovery Uranium Project is within the treaty protected territory of the Great Sioux Nation under Fort Laramie Treaties of 1851 and 1868, and

WHEREAS, the Tribal Council enacts this Resolution to request that the United States place a moratorium on all proposed activity in connection with the proposed Dewey-Burdock In Situ Recovery Uranium Project until the United States complies with all federal laws, including the National Environmental Protection Act and the National Historic Preservation Act, and until the United States engages in meaningful government-to-government consultation with all sixteen (16) Tribes of the Great Sioux Nation to ensure proper protection of the Black Hills and sacred lands in and around the Black Hills, all of which are within the treaty protected territory of the Great Sioux Nation under the Fort Laramie Treaties of 1851 and 1868, and

WHEREAS, existing archaeological, cultural, and historic preservation surveys are inadequate; inadequate time and resources have been allotted to complete such surveys on the proposed project area, which is in excess of 10,500 acres; additional time and resources are

needed to continue the process and to protect and prevent desecration of our sacred lands and resources; and all affected Tribal Nations must have the opportunity, access, time, and resources to participate in and complete thorough and accurate archaeological, cultural, and historic preservation surveys prior to completion of the Section 106 process under the National Historic Preservation Act, and

WHEREAS, all sixteen (16) Tribes of the Great Sioux Nation, and all other affected Indian Tribes, must be afforded an opportunity to engage in meaningful government-to-government consultation with the United States before the project proceeds any further; now

THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council of the Oglala Sioux Tribe does hereby requests that the United States place a moratorium on all proposed activity in connection with the proposed Dewey-Burdock In Situ Recovery Uranium Project until the United States complies with all federal laws, including the National Environmental Protection Act and the National Historic Preservation Act, and

BE IT FURTHER RESOLVED, that the Oglala Sioux Tribal Council hereby requests that the United States place a moratorium on all proposed activity in connection with the proposed Dewey-Burdock In Situ Recovery Uranium Project until the United States engages in meaningful government-to-government consultation with all sixteen (16) Tribes of the Great Sioux Nation, and other affected Indian Tribes, to ensure proper protection of the Black Hills and sacred lands in and around the Black Hills, all of which are within the treaty protected territory of the Great Sioux Nation under the Fort Laramie Treaties of 1851 and 1868, and

BE IT FURTHER RESOLVED, that the Oglala Sioux Tribal Council hereby requests that the United States and the Nuclear Regulatory Commission allow all affected Tribal Nations the opportunity, access, time, and resources to participate in and complete thorough and accurate archaeological, cultural, and historic preservation surveys prior to completion of the Section 106 Process under the National Historic Preservation Act, and

BE IT FURTHER RESOLVED, that the Oglala Sioux Tribal Council hereby requests that the United States make all pertinent information relating to the proposed Dewey-Burdock In Situ Recovery Uranium Project available and known to the public because it is a matter of extraordinary public importance and our sacred lands and resources are under attack.

RESOLUTION NO. 18-88

Page Three

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as the undersigned Secretary of the Oglala Sioux Tribal Council, of the Oglala Sioux Tribe hereby certify that this Resolution was adopted by a vote of: 14 For; 0 Against; 0 Abstain; and 0 Not Voting; during a REGULAR SESSION held on the 27TH day of JUNE, 2018.

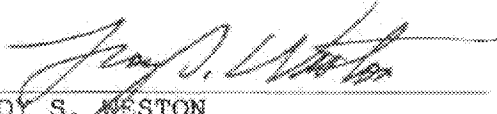


DONNA M. SALOMON

Secretary

Oglala Sioux Tribe

A-T-T-E-S-T:



TROY S. WESTON

President

Oglala Sioux Tribe

RECEIVED
JUL 23 2018
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RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL
OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL OF THE OGLALA SIOUX TRIBE REQUESTING THE NUCLEAR REGULATORY COMMISSION TO REQUIRE POWERTEC (USA) TO INCREASE THE AMOUNT OF FUNDS NEEDED TO COMPLETE AN ADEQUATE CULTURAL RESOURCES SURVEY OF THE DEWEY-BURDOCK IN SITU URANIUM MINING PROJECT IN THE SOUTHERN BLACK HILLS.

WHEREAS, the Oglala Sioux Tribe organized under Section 16 of the Indian Reorganization Act of 1934 on December 14, 1935 (25 U.S.C. § 5123) by adopting a federally approved Constitution and By-laws, and under Article III of the Tribal Constitution, the Tribal Council is the governing body of the Oglala Sioux Tribe, and

WHEREAS, under Article IV, Section 1(a), of the Tribal Constitution, the Tribal Council is vested with the power to negotiate with the United States on behalf of the Tribe and its members, and

WHEREAS, under Article IV, Section 1(w), of the Tribal Constitution, the Tribal Council is vested with the power to adopt laws protecting and promoting the health and general welfare of the Oglala Sioux Tribe and its members, and

WHEREAS, the Black Hills are within the aboriginal and treaty guaranteed homeland of the Oglala Sioux Tribe, and other Sioux tribes, and is also an acknowledged Sacred territory of the Sioux tribes, see Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868), and

WHEREAS, the Black Hills were confiscated by the United States in the Act of February 28, 1877 (19 Stat. 254) in violation of Article 12 of the 1868 Treaty, and provided in Article 8 that the Sioux tribes would be subject to the laws of the United States and "each individual Sioux Indian would be protected in his rights of property, person and life", and

WHEREAS, the Supreme Court interpreted the "subject to the laws of the United States," in the 1877 Act as being "subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian, which acknowledged a trust responsibility between the United States and the Oglala Sioux Tribe, see *Ex Parte Crow Dog*, 109 U.S. 556-568-69 (1883), and

WHEREAS, protection of the persons and lives of each tribal member includes a federal trust obligation to protect the ground waters in the southern Black Hills from contamination within the Cheyenne River watershed that includes all the ground waters in the Southern Black Hills, which ground waters will ultimately flow into the Cheyenne River including that part of the Cheyenne River that constitutes the river bed of the river that abuts and is located within the exterior boundaries of the Pine Ridge Reservation, and

WHEREAS, In Situ uranium mining in the southern Black Hills will contaminate the ground waters and Cheyenne River and will adversely affect the persons and lives of tribal members residing on the reservation and surrounding communities, and the United States and its agencies must fulfill its trust responsibility to the Oglala Sioux Tribe and prevent such contamination from happening, and

WHEREAS, in addition to protect the person and lives of individual tribal members of the Oglala Sioux Tribe, the Tribe also has many cultural resources in the southern Black Hills that are the property of the Tribe, and human remains of ancestors that must be protected in the area referred to as the "Dewey-Burdock" area under NEPA, NHPA, NAGPRA, ARPA, and other applicable federal laws including Article 8 of the 1877 Act, and

WHEREAS, the Nuclear Regulatory Commission (NRC) has approved an Economic Impact Statement (EIS) and has issued a Record of Decision (ROD) for the Dewey Burdock In Situ Uranium Mining Project for Powertec (USA) to engage in extensive In-Situ uranium mining in the Dewey-Burdock area of the southern Black Hills in South Dakota, but the cultural resources survey completed for the EIS is inadequate and must now be completed in consultation with the Oglala Sioux Tribe as required by federal law and regulations, and

WHEREAS, Powertec has approved a budget of \$10,000 (ten thousand dollars) to complete the cultural resources survey which is woefully inadequate to comply with federal laws and regulations, and tribal laws, and

WHEREAS, the Oglala Sioux Tribe Natural Resources Department and Tribal Historic Preservation Office has come up with a budget of \$2,178,665.69 (two million, one hundred seventy-eight thousand, six hundred sixty-five dollars and sixty-nine cents) to adequately complete the cultural sources survey on the Dewey-Burdock 10,500-plus acres involved in Powertec In Situ uranium mining project; now


THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council of the Oglala Sioux Tribe does hereby requests the Nuclear Regulatory Commission to require Powertec (USA) to provide the \$2,178,665.69, determined by the Oglala Sioux Tribal Natural Resources Department and Historic Preservation Office, to adequately complete the cultural resources survey for the Dewey-Burdock 10,500-plus acres for the cultural resources survey and that such a survey be completed prior to any further activity in the affected area, and

BE IT FURTHER RESOLVED, that the Oglala Sioux Tribal Council adopts this Resolution to ensure full compliance will all applicable laws and does so without waiving its opposition to any uranium mining that is not conducted in full compliance will all applicable laws and treaties, including the Fort Laramie Treaties of 1851 and 1868, and

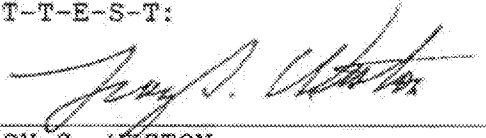
BE IT FURTHER RESOLVED, that the Oglala Sioux Tribe is opposed to any uranium mining and without waiving its opposition requests compliance with all laws including this.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as the undersigned Secretary of the Oglala Sioux Tribal Council, of the Oglala Sioux Tribe hereby certify that this Resolution was adopted by a vote of: 14 For; 0 Against; 0 Abstain; and 0 Not Voting; during a REGULAR SESSION held on the 27TH day of JUNE, 2018.


DONNA M. SALOMON
Secretary
Oglala Sioux Tribe

A-T-T-E-S-T:


TROY S. WESTON
President
Oglala Sioux Tribe

Dewey-Burdock 10,500 acres tribal cultural survey				
Activity	# Units	Unit	Cost	Totals
Record Search with SD State Historical Society	1	Each	\$130.00	\$130.00
Fieldwork Authorization	0	Hours	\$50.00	\$0.00
Record Search Time & Mapping	1	Days	\$400.00	\$400.00
Field Work Preparation	5	days	\$400.00	\$2,000.00
Field Inventory 10 meter intervals	400	Days	\$500.00	\$200,000.00
Site Recording & Evaluation Estimated 200 sites	200	Days	\$500.00	\$100,000.00
Field Mileage	20000	Miles	\$0.535	\$10,700.00
Lodging & Per Diem	400	Nights	\$195.00	\$78,000.00
Report preparation	200	Days	\$400.00	\$80,000.00
Tribal Elder + Support personnel Costs, Fees/Gifts			\$0.00	\$500,000.00
Oral History Research & Interviews	365	Days	\$400.00	\$146,000.00
Oral History Report Preparation	180	Days	\$400.00	\$72,000.00
Oral History Mileage	18000	Miles	\$0.535	\$9,630.00
Oral History Per Diem	90	Nights	\$195.00	\$17,550.00
Materials and Supplies, Equipment			\$0.00	\$100,000.00
Project Management	365	Days	\$500.00	\$182,500.00
Sub Total				\$1,498,910.00
Indirect Costs/Tribal Overhead	45.35			\$679,755.69
Total				\$2,178,665.69

RESOLUTION OF THE EXECUTIVE COMMITTEE
OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

RESOLUTION OF THE EXECUTIVE COMMITTEE OF THE OGLALA SIOUX TRIBE REQUESTING THE NUCLEAR REGULATORY COMMISSION TO REQUIRE POWERTEC (USA) TO INCREASE THE AMOUNT OF FUNDS NEEDED TO COMPLETE AN ADEQUATE CULTURAL RESOURCES SURVEY OF THE DEWEY-BURDOCK IN SITU URANAUMIN MINING PROJECT IN THE SOUTHERN BLACK HILLS.

WHEREAS, the Black Hills are within the aboriginal and treaty guaranteed homeland of the Oglala Sioux Tribe, and other Sioux tribes, and is also an acknowledged Sacred territory of the Sioux tribes, and

WHEREAS, the Black Hills was confiscated by the United States in the Act of February 28, 1877 (19 Stat. 254) in violation of Article 12 of the 1868 Treaty, and provided in Article 8 that the Sioux tribes would be subject to the laws of the United States and "each individual Sioux Indian would be protected in his rights of property, person and life," and

WHEREAS, the Supreme Court interpreted the "subject to the laws of the United States," in the 1877 Act as being "subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian. . . .," which acknowledged a trust responsibility between the United States and the Oglala Sioux Tribe, see *Ex Parte Crow Dog*, 109 U.S. 556-568-69 (1883), and

WHEREAS, protection of the persons and lives of each tribal member includes a federal trust obligation to protect the ground waters in the southern Black Hills from contamination within the Cheyenne River water shed that includes all the ground waters in the Southern Black Hills, which ground waters will ultimately flow into the Cheyenne River including that part of the Cheyenne River that constitutes the river bed of the river that abuts and is located within the exterior boundaries of the Pine Ridge Reservation, and

WHEREAS, In Situ uranium mining in the southern Black Hills will contaminate the ground waters and Cheyenne River and will adversely affect the persons and lives of tribal members residing on the reservation and surrounding communities, and the United States and its agencies must fulfill its trust responsibility to the Oglala Sioux Tribe and prevent such contamination from happening, and

WHEREAS, in addition to protect the person and lives of individual tribal members of the Oglala Sioux Tribe, the Tribe also has many cultural resources in the southern Black Hills that are the property of

the Tribe, and human remains of ancestors that must be protected in the area referred to as the "Dewey-Burdock" area under NEPA, NHPA, NAGPRA, ARPA, and other applicable federal laws including Article 8 of the 1877 Act, and

WHEREAS, the Nuclear Regulatory Commission (NRC) has approved an Economic Impact Statement (EIS) and has issued a Record of Decision (ROD) for the Dewey Burdock In Situ Uranium Mining Project for Powertec (USA) to engage in extensive In-Situ uranium mining in the Dewey-Burdock area of the southern Black Hills in South Dakota, but the cultural resources survey completed for the EIS is inadequate and must now be completed in consultation with the Oglala Sioux Tribe as required by federal law and regulations, and

WHEREAS, Powertec has approved a budget of \$10,000 (ten thousand dollars) to complete the cultural resources survey which is woefully inadequate to comply with federal laws and regulations, and tribal laws, and

WHEREAS, the Oglala Sioux Tribe Natural Resources Department and Tribal Historic Preservation Office has come up with a budget of \$2,178,665.69 (two million, one hundred seventy eight thousand, six hundred sixty five dollars and sixty nine cents) to adequately complete the cultural sources survey on the Dewey-Burdock 10,500 acres involved in Powertec In Situ uranium mining project, and

WHEREAS, Article IV, Section 1 (a) of the Tribal Constitution empowers the Tribal Council to "[t]o negotiate with the Federal, State, and local governments, on behalf of the tribe, and to advise the representatives of the Interior Department on all activities of the Department that may affect the Pine Ridge Indian Reservation" under Article IV, Section 1 (a), and Article IV, Section 1 (w) of the Tribal Constitution empowers the Tribal Council "[t]o adopt laws protecting and promoting the health and general welfare of the Oglala Sioux Tribe and its membership" under Article IV, Section 1 (w), and

WHEREAS, Article XIII, Section 6 of the Tribal Constitution also empowers the Tribal Executive Committee "to act on behalf of the Tribal Council when the Tribal Council is not in session" and to "be in charge of all routine matters that arise during such recess . . . and such other matters as may be delegated to it by the Tribal Council and shall adopt resolutions that are not inconsistent with resolutions or ordinances adopted by the Tribal Council,"

WHEREAS, the Tribal Council has delegated authority to the Tribal Executive Committee to act on its behalf and pass the instant resolution pursuant to Article XIII, Section 6 of the Tribal Constitution; now

THEREFORE BE IT RESOLVED that the Executive Committee of the Oglala Sioux Tribe requests the Nuclear Regulatory Commission to require Powertec (USA) to provide the \$2,178,665.69 determined by the Oglala Sioux Tribal Natural Resources Department and Historic Preservation Office to adequately complete the cultural resources survey for the Dewey-Burdock 10,500 acres for the cultural resources survey which will allow Powertec to engage in In-Situ uranium mining in the Southern Black Hills, and

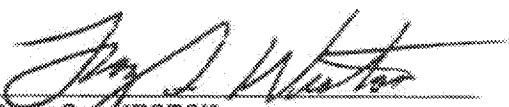
BE IT FURTHER RESOLVED, that this Resolution is passed based upon emergency status and contingent upon receiving a budget.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as undersigned Secretary of the Oglala Sioux Tribe hereby certify that this Resolution was adopted by the vote of: 3 For; 0 Against; 0 Abstain; and 0 Not Voting; during a REGULAR SESSION held on this 14TH day of JUNE, 2018.


DONNA M. SALOMON
Secretary
Oglala Sioux Tribe

A-T-T-E-S-T:


TROY S. WESTON
President
Oglala Sioux Tribe



Dewey-Burdock 10,500 acres tribal cultural survey				
Activity	# Units	Unit	Cost	Totals
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